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The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees

Report of the Office of the United Nations High Commissioner for Refugees

Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) has convened three meetings since 2002 on rescue at sea and refugee protection: the expert round table on rescue at sea in Lisbon in March 2002; the expert meeting on interception and rescue in the Mediterranean in Athens in September 2005; and the meeting of State representatives on the same issue in Madrid in May 2006.

2. The meetings brought together participants from Governments, the shipping industry, international organizations, non-governmental organizations and academia. They resulted in a number of important observations and recommendations, aimed at preserving the integrity of the global search and rescue regime for which irregular migration poses a particular challenge, and at meeting the humanitarian and protection needs of those in distress. However, participants also recognized that efforts to improve search and rescue operations for migrants and refugees in distress at sea are only one aspect of addressing the broader challenges of irregular maritime migration. This requires tackling all the different aspects of this phenomenon in a comprehensive manner, from the root causes to differentiated solutions after disembarkation.

3. The points below synthesize the main conclusions of the meetings. They include suggestions for the strengthening of the maritime search and rescue regime, as well as recommendations for a broader approach to address irregular maritime migration beyond the imminent rescue phase.

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4. An inter-agency meeting on rescue at sea[1] and a forum convened by UNHCR on the theme "High Commissioner's dialogue on protection challenges" brought about some further suggestions which have also been incorporated into the present document.

Conclusions and recommendations

International migration by sea

5. Irregular maritime migration is only a small component of the overall phenomenon of international migration, but it raises specific challenges which need to be addressed.

6. While it is not in essence a refugee[2] problem, there are refugee protection issues to contend with which must be addressed as part of the broader response to irregular maritime migration, and asylum must effectively be made available in such situations for those requiring it.

7. Irregular maritime migration requires a collaborative response, involving a wide range of actors, including intergovernmental organizations.

8. Human rights and refugee law principles are an important point of reference in handling rescue at sea situations.

Preserving the integrity of the search and rescue regime, including through capacity-building measures

9. The rescue of persons in distress at sea is not only an obligation under the international law of the sea but also a humanitarian necessity, regardless of who the people are or what their reasons are for moving.

10. The integrity of the global search and rescue regime, as governed by the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue, must be scrupulously protected. This is a responsibility of the international community as a whole.

11. It is critical that flag States exercise effective jurisdiction and control over their vessels, particularly by prohibiting them to be used for smuggling or trafficking purposes. Strict compliance with safety standards set out in relevant international instruments is also necessary. Unseaworthy vessels should not be permitted to sail.

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[1] The following agencies participated in the inter-agency meeting: the Division for Ocean Affairs and the Law of the Sea, United Nations Secretariat, New York; the International Labour Organization; the International Maritime Organization; the International Organization for Migration; the Office of the United Nations High Commissioner for Human Rights; and the Office of the United Nations High Commissioner for Refugees.

[2] The term "refugee" throughout the present document includes persons who qualify for refugee status under the 1951 Convention relating to the Status of Refugees (well-founded fear of persecution) as well as people who are unable to return to their country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing the public order.

12. Effective measures are required to prevent small ships and other ships that are not subject to international regulation from being used for smuggling or trafficking purposes. Some States may require assistance and support in that regard.

13. States should ensure that masters of ships flying their flag take the steps required by relevant instruments (the 1974 and 1979 Conventions and the UNCLOS 1982 United Nations Convention on the Law of the Sea) to provide assistance to persons in distress at sea.

14. States should take the necessary measures to disseminate, to shipmasters and government officials involved in rescue at sea operations, relevant provisions of maritime law and accompanying guidelines, including new amendments.

15. States should cooperate in taking all necessary measures to ensure the effective implementation of the amendments to the 1979 Convention, the 1974 Convention relating to the delivery of persons rescued at sea to a place of safety, as well as the associated Guidelines on the Treatment of Persons Rescued at Sea.[3]

16. States should facilitate rescue operations by ensuring that the necessary enabling arrangements are in place in their search and rescue area.

17. Rescue coordination centres[4] should make plans and arrangements for the disembarkation of persons rescued at sea and their delivery to a place of safety.

18. Parties to the 1979 Convention and the International Maritime Organization (IMO) could provide support to States in establishing functioning and sustainable search and rescue facilities. Such support could also lead to gradual harmonization of approaches to search and rescue.

19. As parties to the 1979 Convention, it may be necessary for some States to support and assist other States in establishing functioning, sustainable search and rescue facilities. Such support would lead to the gradual harmonization of approaches to search and rescue.

20. States should avoid the categorization of interception operations as search and rescue operations, because this can lead to confusion with respect to disembarkation responsibilities.[5]

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[3] Under the 1979 and 1974 Conventions, States parties have an obligation to coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that such release does not further endanger the safety of life at sea. The party responsible for the search and rescue region must exercise primary responsibility for ensuring that such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, which will regularly require disembarkation on land.

[4] A rescue coordination centre is a unit responsible for promoting the efficient organization of search and rescue services and for coordinating the conduct of such operations within a search and rescue region.

[5] The responsibilities of States regarding search and rescue are described in footnote 3 above. As regards interception, the United Nations Convention on the Law of the Sea grants coastal States enforcement rights in certain maritime zones to prevent and punish the infringement of immigration laws. These rights must be exercised in accordance with international law. Under the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, boarding and inspection of ships may be undertaken by a State party, other than the flag State, where a vessel is suspected of being engaged in the smuggling of migrants by sea in accordance with the safeguards outlined in the Protocol.

Duties of shipmasters, shipping and insurance agencies

21. The responsibility to assist persons in distress at sea is an obligation on shipmasters established under maritime law. The duty is triggered at the outset of the actual rescue and ends when passengers have been disembarked at a place of safety.

22. Decisions as to when and where to land rescued persons will be influenced by factors such as the safety and well-being of the ship and its crew and the appropriateness of the place of landing (safety, closeness and the ship's pre-rescue schedule).

23. Shipping and/or insurance companies should promptly inform IMO, UNHCR and other relevant actors when disembarkation proves problematic or when rescued persons claim asylum. This facilitates cooperation in finding an appropriate disembarkation solution.

24. Cases of refusal of disembarkation should be documented by shipping companies and reported through the flag State to IMO. This information can then be used by relevant intergovernmental organizations to better quantify the problem and devise solutions with the concerned States.

25. Shipping and insurance companies should, through the flag State, provide regular statistics to IMO on incidents of stowaways.

26. Shipping companies should ensure that shipmasters are made aware of the practical consequences resulting from the IMO guidelines on the treatment of persons rescued at sea through the provision of multilingual information material.

Minimizing the inconvenience for private actors in fulfilling their maritime obligations

27. Shipmasters who undertake rescue operations should not be seen as part of the problem; rather, their actions in saving the lives of persons in distress should be recognized and supported by States.

28. The professional judgement of shipmasters as regards the determination of when and where to disembark the persons rescued should be sought and given due weight, in addition to any relevant requirements of the Government responsible for the search and rescue region in which the survivors were recovered or of another responding coastal State. Shipping companies should not be penalized in any manner whatsoever for disembarking or attempting to disembark people rescued at sea.

29. The shipmaster has the right to expect the assistance of coastal States with facilitation of disembarkation and completion of the rescue.

30. States should not impose a requirement that shipping companies or their insurers cover the repatriation costs of people rescued at sea as a precondition for disembarkation.

31. A non-State vessel is not an appropriate place to screen and categorize those rescued, including whether they are refugees or otherwise in need of protection, or devise solutions for them; nor should such a vessel be used as a floating detention centre.

Disembarkation

32. The responsibility for finding solutions to enable timely disembarkation in a humane manner rests exclusively with States and not with private actors. States have a duty to coordinate and cooperate in finding a place of safety under maritime law.

33. Disembarkation procedures should not be governed by immigration control objectives.

34. Disembarkation procedures should be harmonized, speedy and predictable in order to avoid recurrent time-consuming case-by-case negotiation problems, which can endanger the lives of those rescued. Procedures should balance the interests of the shipping industry and the basic needs of individuals rescued at sea.

35. Disembarkation, particularly when it involves large numbers of persons, does not necessarily entail the provision of durable solutions in the country of disembarkation.

Reception standards, profiling and referral to differentiated procedures after disembarkation

36. Comprehensive reception arrangements should be established for persons rescued at sea which meet the needs of the rescued persons, according to their situations and in line with their international human rights standards. Such reception arrangements should include provisions of adequate health care.

37. Rapid-response teams could assist States facing large-scale arrivals. There may be value in establishing multidisciplinary teams (which include government experts as well as international and local governmental and non-governmental organizations) for maritime arrival situations; such teams would address any immediate needs, provide information and refer arrivals to appropriate response mechanisms (profiling). The teams may include or benefit from the expertise of non-governmental organizations.

38. Persons claiming asylum should be allowed to enter the national asylum procedure without delay; in countries where no asylum procedure exists, they should be referred to UNHCR. The State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged.

39. Fair and efficient asylum procedures help to distinguish individuals who qualify for refugee protection or who are protected against refoulement under international and regional human rights instruments from those who do not have such needs.

40. Trafficked persons and other vulnerable groups, such as separated children, will require specific assistance and appropriate protection. They may have a claim to refugee protection.

Comprehensive solutions

41. Refugees should receive protection and, in due course, access to a durable solution, either through local integration or resettlement.

42. Persons not seeking asylum and those who are found not to qualify for refugee protection or have no other compelling humanitarian reasons to remain should be encouraged and assisted to return to their country of origin in humane and safe

conditions, unless an alternative legal migration option might be available to them. The International Organization for Migration and other organizations may offer support to States in implementing assisted voluntary return programmes.

43. Return should be complemented by efforts to reintegrate migrants in their community of origin, to ensure the sustainability of return and avoid a "recycling" phenomenon.

44. The development of an appropriate response to secondary movements of refugees[6] is a critical challenge.

Combating smuggling and trafficking

45. More vigorous and effective action is needed to prevent smuggling and trafficking as well as to identify, arrest and prosecute smugglers and traffickers. However, any action taken should follow a human rights-based approach.

46. States should renew their cooperation in protecting witnesses who assist in identification and prosecution of smugglers and traffickers. Protection of victims of trafficking shall not be made conditional upon their capacity and willingness to cooperate in legal proceedings.

47. Measures to combat smuggling and trafficking of persons must not adversely affect the human rights and dignity of persons and must not undermine international refugee protection responsibilities (human rights-based approach).

Prevention: information strategy and addressing root causes

48. Multilateral cooperation should include a proper review of mechanisms for the creation of orderly migration and protection channels in order to provide alternative opportunities for migrants.

49. States, relevant intergovernmental organizations and non-governmental actors should explore the feasibility of establishing mass information campaigns to inform prospective clandestine passengers of the risks associated with irregular maritime migration. Such campaigns should touch upon the various risks associated with overland travel en route to the prospective embarkation point. They should be targeted at communities in countries of origin, transit countries and migrant communities in countries of destination.

50. States should adopt broader, longer-term multilateral commitments to address the root causes of irregular migration. Additional efforts are called for, such as re-targeting aid to achieve sustainable development and the development of alternative legal migration channels.

Improved information management

51. Collection of empirical data on the scale and scope of irregular maritime migration, interception, rescue at sea, disembarkation and treatment of persons disembarked should be harmonized and more systematically compiled by Governments and international agencies. Statistical information should be

[6] This recommendation refers to the phenomenon of refugees who move in an irregular manner from countries in which they have already found protection in order to seek asylum or permanent resettlement elsewhere.

disaggregated and include the numbers and profile of persons intercepted and disembarked as stowaways or following a rescue.

52. An exchange of data would enable all stakeholders to better address emerging trends and reinforce their cooperation to combat trafficking and abuse or exploitation of migrants.

53. Improved communication procedures among all actors and a better understanding and analysis of the challenges in relation to disembarkation may facilitate the sharing of best practices and the identification and realization of timely and fair solutions.

Cooperation and responsibility-sharing

54. International cooperative efforts to address complex rescue at sea situations should be built around burden-sharing arrangements. These arrangements could encompass the processing of asylum applications and realization of durable solutions, such as resettlement, as well as solutions for non-refugees.

55. Cooperation should also include capacity-building initiatives, including the elaboration and/or revision of national migration and asylum law policies.

56. UNHCR should mobilize States to establish adequate burden-sharing arrangements for refugees and asylum seekers and/or standby resettlement programmes, as appropriate.